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BOOK REVIEWS

THE LAW OF CONTRACTS. By SAMUEL WILLISTON. New York: BAKER, VOORHIS & Co. 1920. Vol. II: pp. xxi, 1158-2329; Vol. III: pp. xxii, 2332-3456; Vol. IV: pp. 3457-4182.

The first volume of Williston on Contracts was reviewed in the June, 1920 number of this REVIEW.¹ It covered offer and acceptance, consideration, formal contracts, parties, contracts for the benefit of third parties, assignment, and the statute of frauds. The remaining three volumes have now come from the press. Volume II covers the performance of contracts, including conditions; particular classes of contracts; sales of land and of personal property, bailments, negotiable paper, suretyship, *etc.* Volume III deals with remedies for breach of contract: damages, specific performance, rescission and restitution: invalidating circumstances: fraud, duress, illegality; the discharge of contracts. Volume IV contains the index and table of cases.

The high standard set in the first volume has been maintained throughout the work. Indeed, it may be said without hesitation that in Williston on Contracts we have the most important contribution to the literature of Anglo-American law which has been made since the publication of Wigmore on Evidence. If a comparison were to be made in a sentence, one might say that Wigmore excels somewhat in keenness of analysis, Williston in sanity and practical wisdom.

It is of course impossible within the limits of a review to discuss critically and in detail Professor Williston's views upon all, or even all the more important, topics dealt with, and no attempt to do so will here be made. Perhaps no portion of the work is more important, or more characteristic of the author's methods of thought, than that relating to the interpretation of contracts and, in connection with that, the parol evidence rule. Following logically the "objective" view of contracts adopted in the first volume, Professor Williston makes it clear that we are here primarily concerned not with the intention, *i. e.* the mental state, of the party using the language in question, but rather with the interpretation, *i. e.* the "legal meaning," of that language. To ascertain this we must first of all establish a "standard of interpretation." Wigmore recognized four possible standards from which the law can choose, *viz.* (1) the *popular* standard; (2) the *local* standard; (3) the *mutual* standard; (4) the *individual* standard. To these Professor Williston adds a fifth: "the sense in which the party using the words should reasonably have apprehended that they would be understood by the other party." According to Professor Williston's analysis, the standard to be applied to contracts which have been "integrated"—to use Wigmore's useful phrase—as well as to written memoranda required by the statute of frauds, differs from that to be applied to all other contracts. Dealing first with the latter, *i. e.* with contracts not "integrated" or represented by a writing, the author concludes that the standard "which the modern law tends to accept, and which is supported by sound principle" is the last of those given above. On the other hand, the standard of interpretation where the parties have assented to a writing as expressing the agreement, or where a writing is required by law is, he contends, "according to the weight of authority and on principle," the local standard, *i. e.* "the meaning of the writing to parties of the kind who contracted at the time and place where the contract was made and with such circumstances as surrounded its making."

¹ (1920) 20 COLUMBIA LAW REVIEW 716.

Professor Williston thus rejects Wigmore's argument in favor of a purely mutual standard. In doing so he is undoubtedly more nearly in accord with the views of the common law courts than is Wigmore. Apparently the author believes that equity adopts the same standard. This is at least open to question, as appears when we come to discuss the applicability of the parol evidence rule in equity. Professor Williston's treatment of this latter rule again leaves little to be desired, so far as relates to the common law decisions. When, however, he comes to deal with the applicability of the rule in equity, once more doubts arise. His view upon this matter seem to be based fundamentally upon that of the "Langdell-Ames-Maitland" school of thought, that "equity" and "law" are not in "conflict". For example in speaking of "certain decisions at law and in equity, which at first sight may be thought antagonistic", he says that they can be "combined as parts of a harmonious whole". (Section 1537.) Carrying out this idea, he states that

"the parol evidence rule is applicable in equity as well as at law" but adds that "where a case of fraud is alleged or such mistake as equity deems a basis for relief or a defense to a suit for specific performance is made out, the parol evidence rule is disregarded because equity will not allow it to work injustice. But aside from such cases, the memorials of the parties which they have agreed upon as the external expression of their will, establish the terms of the contract as conclusively in equity as at law."

Again, in another place he puts the matter as follows:

"The right of reformation wherever allowed is necessarily an invasion or limitation of the parol evidence rule, since when equity reforms a writing it enforces an oral agreement at variance with the writing which the parties had agreed upon as a memorial of their bargain. This limitation is necessary to work justice, and there seems no more reason to object to it in case of reformation than in case rescission for fraud or for mistake. In either case, unless the mistake precludes the existence of a contract at law, *it should not be denied that the writing correctly states the actual contract or conveyance which has been made, but as it is inequitable to allow the enforcement of it, and (where reformation is appropriate) as justice requires the substitution of another in its place, equity gives relief*; and to that end necessarily admits any relevant parol evidence." (The italics are those of the present writer).

Space is lacking at this time in which to discuss adequately these statements, but to the reviewer they seem hardly an apt way of describing the results reached by our courts of equity or the theory upon which they act. Compare, for example, the following statement of Wells, J., in *Glass v. Hulbert* (1869) 102 Mass. 24:

"The principle on which courts of equity rectify an instrument so as to enlarge its operation or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence on the ground of an omission, by mutual mistake, in the reduction of the agreement to writing, is, as we understand it, that in equity *the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing*, and upon clear proof of its terms the court compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement, as actually intended to be made, shall be truly expressed and executed." (The italics are those of the present writer).

This latter view, which seems to the reviewer to be that of the courts, recognizes frankly that the substantive law of contracts "in equity" is different from that which obtains "at law", and that in equity it is the oral rather than the written promises to which "legal obligation" is attached. In other words, since, in a reformation case, equity will (1) refuse specific performance of the written promise; (2) enjoin an action at law on the same; and (3) order "reformation" and performance of the bargain as expressed in the oral promises, it seems more

nearly in accord with the facts to say that equity attaches "legal obligation" to the oral rather than the written promises.

The matter becomes especially clear in states in which, as Professor Williston points out, facts which hitherto have entitled one only to rescission or reformation in equity may now be used as "equitable defenses" to common law actions for damages based on the written promises. It seems obvious that in such jurisdictions the written promises no longer have "legal obligation" attached to them. It seems, however, that this change is not really one of substantive law, but merely of procedure. As far as the substantive rights of the parties are concerned, the net legal effect under the old system was the same; the only real difference is in the mode of setting judicial tribunals in motion in order to have that legal effect recognized and enforced.

In dealing with the question of the relation of the statute of frauds to the right to reformation, the author takes the position that reformation should be denied in the case of executory contracts (Section 1555) but granted in the case of executed transactions, such as conveyances. The reasons given seem to the present writer inadequate to distinguish the problem of reformation in cases of conveyances which fail to convey all that was intended from that which arises in the case of executory contracts. To say that in the former "a constructive trust arises" (page 2755) is not to give a reason but merely to state a result. Consider the condition of things immediately after the conveyance (where too little has been conveyed) and before any farther change of position has taken place: what basis have we, under the principle of unjust enrichment, for imposing a "constructive trust", *i. e.*, an equitable duty, not based upon agreement, to convey the omitted portions, which would not equally apply to any case where a plaintiff has fully performed his side of a bargain? It seems clear that to grant rescission unless the grantor conveys the omitted part would answer all the requirements of a rule directed against unjust enrichment.

Of course there are cases in which rescission would not be fair because of changes of position which have taken place since the conveyance, and to such cases Professor Williston's argument is applicable. The comparison which he makes to the equitable doctrine of "part performance" does not help much, for it seems clear that that doctrine amounts, as far as it goes, to a repeal of the statute by judicial decision. Moreover, under the rule as to part performance in the form in which it prevails in, probably, the majority of jurisdictions, the acts of "part performance", so-called, do at least suggest that there was a bargain of some kind with reference to the land in question, whereas in the reformation cases (where too little is conveyed) this is not true—a deed conveying Blackacre and a payment of money therefor do not in any way suggest that Whiteacre also was to be conveyed.

In his criticism of the doctrine of anticipatory breach Professor Williston, in arguing against the doctrine as based upon bad logic, says: "He [the defendant] is held liable on a promise he never made. He has only promised to do something at a future day. He is held to have broken his contract by doing something before that day." Here, as in so many other places in his work, the author seems to overlook the distinction between facts and the legal consequences of facts. Promisors are never, strictly speaking, held liable for breaking promises as such, but rather for violating the legal obligations attached by the law to their promises. To this it may perhaps be replied, that the legal obligations are to keep the promises as made. Unfortunately, or perhaps fortunately, our law of contracts is not so simple. Neither at common law nor in equity is such a statement a correct description of the law. Wherever a "condition" is "implied in law", the legal obligation becomes at once different in scope from the promise

as made. This difference between the scope of the promises and the scope of the resulting legal obligations becomes especially striking in the cases in equity which allow specific performance with abatement in price because of deficiencies; it is, however, by no means confined to equity. As a matter of mere logic, then, the law may if it wishes hold that one legal consequence of contractual promises is a duty not to announce to the other party, prior to the date set for performance, that one is not going to perform. The only real problem, therefore, is that of policy; does such a rule work well in practice? Professor Williston believes it does not, and his criticisms of the rule upon these grounds are of great weight.

One may, however, differ with Professor Williston upon these and other particular topics; he may wish that a more searching fundamental analysis had been used throughout the work—an analysis, that is, that kept always in mind the distinction between facts and their legal consequences, between the different meanings given to the word right, *etc.*,—without failing to recognize that the whole legal profession owe a great debt of gratitude to Professor Williston for the patience, the thoroughness, and, above all, the sanity with which he has collected, digested and discussed for us this immense mass of material. The book is as indispensable in the field of contracts as Wigmore is in that of evidence.

WALTER WHEELER COOK

COLUMBIA LAW SCHOOL

A MONOGRAPH ON PLEBISCITES, with a Collection of Official Documents. By SARAH WAMBAUGH. New York: OXFORD UNIVERSITY PRESS. 1920. pp. xxxvi, 1088.

As an abstract proposition it seems reasonable that all civilized people should have a voice in determining matters affecting their own destiny. It is on this principle that the resort to plebiscites is based.

The moment this postulate of self-determination is taken out of the realm of mental abstractions and concretely applied, it becomes apparent that it is subject to important limitations. In its broadest meaning a plebiscite is a direct appeal to popular preference, and can be justified only on the assumption that popular preference should govern in the particular matter to be acted upon.

It requires but little reflection to realize that in many cases the momentary popular will, wholly apart from the problem of ascertaining it, is likely to prove a very uncertain and inadequate foundation for a right decision; partly because in a definite sense such a preference may not really exist, and partly because even when it clearly exists it may be inspired more by transient causes than by a perception of real and permanent interests. To give it value such an expression of preference presupposes both a competent capacity of judgment and the possession of sufficient information regarding the consequences, positive and negative, of the proposal on which a decision is to be rendered. In the absence of one or both of these two requisites, direct action, as distinguished from representative action, becomes the most hazardous and the least trustworthy of all possible methods of settling important questions.

It is not, however, in this wide application of the word that plebiscites are considered in this important work, which confines attention to the doctrine of national self-determination; that is, to the question of determination by the inhabitants of a given circumscribed area of the national group to which they shall belong. Many interesting plebiscites of importance from an historical point of view, like those resorted to in order to determine the form of government or the personality of the sovereign, are thus excluded from the scope of this